Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ERNESTO T. GARCIA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the refusal to consider an alien's request for discretionary relief, in violation of statute and regulation is reversable legal error and a violation of an individual's statutory and constitutional rights.

2. Whether it is a violation of due process for an agency to avoid its mandatory duty to duly consider an individual's entitlement by prejudging the merits in a cursory fashion in advance of the required adjudication.

PARTIES TO THE PROCEEDINGS

Petitioner Ernesto Garcia was also the petitioner in the court of appeals, and Respondent Immigration and Naturalization Service was the respondent below.

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PETITION FOR A WRIT OF CERTIORARI

Ernesto Garcia ("Mr. Garcia"), through his undersigned counsel, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The immigration judge's ("IJ") decision denying Mr. Garcia's applications for adjustment of status and voluntary departure, and ordering him deported from the United States, App. 8-12, *infra*, is unpublished. The decision of the Board of Immigration Appeals ("BIA") dismissing his appeal, App. 5-7, *infra*, is unpublished. The memorandum opinion of the court of appeals denying Mr. Garcia's petition for review of the BIA's decision, App. 1-4, *infra*, is also unpublished. The court of appeals' order denying his petition for rehearing, and petition for rehearing *en banc*, App. 18, *infra*, is unpublished.

JURISDICTION

The opinion of the court of appeals was filed on October 17, 2001. App. 1-4, *infra*. A petition for rehearing and rehearing *en banc* was denied on January 7, 2002. App. 18, *infra*. This Court has jurisdiction to review the court of appeals' opinion pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 245(a) of the Immigration and Nationality Act ("INA") [8 U.S.C. § 1255(a)] authorizes the Attorney General, in his discretion, to adjust the status of an alien to that of an alien lawfully admitted for permanent residence in the United States. App. 19, *infra*.

Section 212(a)(6)(C)(i) of the INA [8 U.S.C. § 1182(a)(6)(C)(i)] states that any alien who, by fraud or willfully misrepresenting a material fact, seeks or has sought to procure a visa, other documentation, or admission into the United States is inadmissible. App. 19-20, *infra*.

Section 212(i) of the INA [8 U.S.C. § 1182(i)] permitted the Attorney General, in his discretion, to waive the application of Section 212(a)(6)(C) of the INA in the case of an alien who is the parent, spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence. App. 20, *infra*.

Section 349 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 U.S.C. § 1101], Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA") amended Section 212(i) to allow the Attorney General, in his discretion, to waive section 212(a)(6)(C)(i) of the INA if the refusal to grant the alien admission would result in extreme hardship to the alien's U.S. citizen or permanent resident spouse or parent. App. 20-21, *infra*.

Section 309(c)(4)(E) of IIRIRA [8 U.S.C. § 1101] states "there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the INA

as in effect as of the date of the enactment of this Act [Sept. 30, 1996])."

8 C.F.R. § 240.11(a)(2) instructs an immigration judge to inform an alien of his or her apparent eligibility to apply for any of the benefits enumerated in the statute and to afford an alien an opportunity to make an application during the hearing. App. 21, *infra*.

8 C.F.R. § 245.1(f) permits concurrent applications to overcome grounds of inadmissibility and states there is no fee required for filing an application to overcome the grounds of inadmissibility of the INA if filed concurrently with an application for adjustment of status. App. 22, *infra*.

STATEMENT

This case concerns the rejection of the court of appeals to consider an individual's request for discretionary relief, in violation of the immigration statute and regulations. The immigration statute's framework expressly permits an individual applying for adjustment of status to that of a lawful permanent resident of the United States to also apply for a waiver if he or she is found inadmissible for any alleged misrepresentation.

The court of appeals ignored Congress' mandate that an individual who applies to the Immigration and Naturalization Service ("INS") for adjustment of status may concurrently file an application for a waiver of inadmissiblity. Specifically, this case presents the question of whether a court of appeals may retain jurisdiction over a

discretionary application despite bar on judicial review pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) where an individual's due process rights are violated and the administrative agency prevents an individual from submitting an application.

Ernesto Garcia, the petitioner, was born on July 29, 1956. He is a native and citizen of the Philippines. He entered the U.S. as a nonimmigrant on April 12, 1983, and has resided in this country for the last eighteen (18) years. Mr. Garcia has been married to a Rosario Garcia, a U.S. citizen, for approximately sixteen (16) years. They have two daughters born in California: Rowena Garcia born on August 2, 1986 and Lizette Jill Garcia born on August 7, 1988. They own their own home in Arleta, California.

Mr. Garcia became eligible to submit an application for adjustment of status to lawful permanent residence in 1988 when the INS approved the immigrant visa petition filed by his wife. The INS denied his application for adjustment of status. Mr. Garcia had been arrested on January 21, 1987, as part of an undercover operation conducted at a hotel he was working for in Downtown, Los Angeles.

The INS issued an Order to Show Cause ("OSC") and placed Mr. Garcia in deportation proceedings. He was charged with being deportable for having been convicted of the offense of sale of .004 grams of cocaine pursuant to U.S. Code 1251(a)(11) (eff. 10/27/86). At Mr. Garcia's master calendar hearing before the immigration judge ("IJ"), on April 18, 1988, his then attorney revealed to the court that Mr. Garcia had a conviction. On July 26, 1988,

Mr. Garcia's plea of guilty was set aside and the criminal judgment vacated. Subsequently, on August 3, 1988, the INS withdrew the previous charge of deportability against Mr. Garcia and issued an amended OSC charging Mr. Garcia with being deportable as a nonimmigrant overstay. On December 6, 1988, Mr. Garcia was placed in a diversion program.

On November 7, 1989, Mr. Garcia renewed his application for adjustment of status before the IJ. In the alternative, Mr. Garcia requested voluntary departure. His then attorney corrected the information about Mr. Garcia's arrest on the original application for adjustment given to the INS, and also submitted a revised application to the IJ with the new information. His then attorney also attempted to submit a Form I-601, application for waiver of inadmissibility pursuant to section 212(i) of the INA [8 U.S.C. § 1182(i)] should the IJ find Mr. Garcia excludable for allegedly seeking to procure a visa or other documentation by fraud, or by willfully misrepresenting a material fact. App. 19-20, *infra*.

In his oral decision, the IJ found that although Mr. Garcia was not deportable on the criminal charge because his conviction was properly vacated, he was deportable as a nonimmigrant overstay. Despite the statutory scheme permitting waiver applications to be filed simultaneously with applications for adjustment of status, App. 20-22, *infra*, the IJ refused to accept Mr. Garcia's application for a waiver and ordered him deported to the Philippines. App. 16, *infra*. He filed an appeal to the BIA.

On May 13, 1993, the BIA summarily dismissed his appeal stating that Mr. Garcia had not identified the basis

for his appeal. On August 9, 1993, Mr. Garcia filed a Petition for Review of the BIA's decision with the court of appeals. He also filed a motion to reopen and reconsider with the BIA on December 8, 1993. On March 16, 1994, the court of appeals granted Mr. Garcia's petition for review and remanded his case to the BIA.

While his appeal was pending, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). IIRIRA § 309(c)(4)(E) provides that "there shall be no appeal of any discretionary decision under INA §§ 212(c), 212(i), 212(h), 244 or 245." However, aliens in deportation proceedings continue to be "entitled to the fifth amendment guaranty of due process." *Cruz v. INS*, 147 F.3d 1129 (9th Cir. 1998).

Nearly six (6) years later, on March 9, 2000, the BIA dismissed Mr. Garcia's appeal. The BIA did not mention the statutory and regulatory framework that mandates an applicant who is seeking adjustment of status, but who is found inadmissible be permitted to simultaneously submit an application for waiver. App. 5-7, 20-22, *infra*. The BIA also mischaracterized the administrative record and alleged that Mr. Garcia denied ever being arrested for any violation. The BIA's decision made no mention of the evidence in the record: Mr. Garcia's actual testimony, his attorney's Declaration and a psychological evaluation diagnosing Mr. Garcia at the borderline of mild mental retardation.

Mr. Garcia made a timely Petition for Review and request for a Temporary Stay of Deportation to the court

of appeals. On October 17, 2001, the court issued a memorandum opinion denying Mr. Garcia's petition for review. In its opinion the court stated that under former INA section 212(i), the IJ's decision regarding the application was a matter of discretion and under IIRIRA's transitional rules the court lacks jurisdiction to review discretionary decisions. App. 3, *infra*.[1] The certified administrative record contradicts the finding of the court of appeals which did not review the entire record in this case because the record shows that the IJ refused to even accept Mr. Garcia's application for a waiver. App. 16, *infra*. "I do not find the respondent eligible for that relief [pursuant to section 212(i) of the INA], nor would I grant it if such application were submitted and filed." Contrary to the court's decision, the IJ never exercised his discretion and violated the immigration statute and regulations.

On January 7, 2002, the court denied Mr. Garcia's petition for rehearing *en banc*. This petition for certiorari follows.

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[1] Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, 110 Stat. 3657 on September 30, 1996. IIRIRA § 309(c)(4)(E) provides that there shall be no appeal of any discretionary decision under INA §§ 212(c), 212(i), 212(h), 244 or 245.

REASONS FOR GRANTING THE PETITION

1. This Court's Precedent Decisions Hold That the Decision of Whether an Individual is Statutory Eligibile for Relief From Deportation is Reviewable by Federal Courts

The court of appeal's opinion is erroneous because the refusal to consider an alien's request for discretionary relief, in violation of statute or regulation, is a valid claim and is reviewable by the federal courts. This Court's holding in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) has already determined that in making certain aliens eligible for discretionary relief, Congress intended the Attorney General or her designated subordinates to make a judgment.

The refusal to consider an alien's request for discretionary relief, in violation of statute or regulation, is a valid claim and would frustrate Congress' intent: "[I]f the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *Id.* at 266-67. Contrary to the opinion of the court of appeals in this case, App. 3, *infra*, it was the intent of Congress that such discretion be exercised. App. 20-22, *infra*.

Pursuant to the immigration regulations and statute an individual is permitted to make an application for a waiver simultaneously with his or her application for adjustment of status. App. 20-22, *infra*. Mr. Garcia was eligible to file an application for a section 212(i) waiver

concurrently with an application for adjustment of status.[2] App. 20-22, *infra*. The IJ stated, "I do not find the respondent [Mr. Garcia] eligible for that relief [waiver pursuant to 212(i) of the INA], nor would I grant it if such application were submitted and filed." App. 16, *infra*. Clearly, the IJ did not allow Mr. Garcia to file the application for a waiver. On appeal, the BIA ignored this statutory violation. Despite the agency's violations of the statute and regulations, the court of appeals denied Mr. Garcia's petition for review. App. 1-4, *infra*.

The court of appeals ignored the statutory and regulatory scheme and erroneously stated that when an IJ denies an alien's application for adjustment of status as a matter of discretion, there is no need to adjudicate the alien's waiver application. App. 3, *infra*.

Contrary to the court of appeals opinion, the decision whether a person is eligible to apply for a particular discretionary form of relief is a statutory question separate from the discretionary component of the administrative decision whether to grant relief. In making certain aliens eligible for discretionary relief, Congress intended

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[2] Before the IIRIRA amendment, section 212(i) of the INA [8 U.S.C. § 1182(i)] stated that the Attorney General may, in her discretion, waive application of § 212(a)(6)(C)(i) [8 U.S.C. § 1182(a)(6)(C)(i)] "in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence." App. 20-21, *infra*.

the Attorney General or his designated subordinates to make a judgment. *Shaughnessy*, 347 U.S. at 260.

In Mr. Garcia's case, the IJ did not accept his application for a waiver. App. 15-16, *infra*. On appeal, the BIA did not address the issue. App. 5-7, *infra*. To compound the statutory and constitutional violation, the court of appeals incorrectly stated that the IJ's decision regarding the waiver under former section 212(i) was a matter of discretion under IIRIRA and the court lacks jurisdiction. App. 3, *infra*. However, the IJ did not make a discretionary decision because he refused to accept Mr. Garcia's application for a waiver. App. 16, *infra*. This refusal to consider Mr. Garcia's request for discretionary relief was reversable error and is reviewable by the federal courts. See *Shaughnessy*, 347 U.S. at 266-67.

The intent of Congress when enacting section 212(i) of the INA [8 U.S.C. § 1182(i)] was that such discretion be exercised in cases such as Mr. Garcia's. App. 20-21, *infra*. The plain reading of the statute and regulations state if an alien is inadmissible he or she may apply in conjunction with an application for permanent residence to the IJ for such waiver. App. 21-22, *infra*.

In a similar context, this Court has also held that federal courts retain subject matter jurisdiction over habeas petitions brought by aliens facing removal to the extent that those petitions are based on colorable claims of legal error that an alien's statutory or constitutional rights have been violated. *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2287 (2001). Additionally, the Ninth Circuit has held that jurisdiction to review a deportation proceeding remains in order to determine whether the BIA

applied the correct discretionary waiver standard. See *Aragon-Ayon v. INS*, 206 F.3d 847, 849 (9th Cir. 2000); *Cervantes-Gonzales v. INS*, 232 F.3d 684 (9th Cir. 2000). From these decisions it follows that when an IJ and the BIA do not even permit an alien to apply for a statutory waiver, Federal courts retain jurisdiction to review the deportation proceedings.

In denying Mr. Garcia's petition for review, the court of appeals ignored its own precedent decisions. In *Cervantes-Gonzales v. INS, supra*, an alien who married a lawful permanent resident may apply to have his status adjusted and apply for a discretionary waiver of inadmissibility. In a similar context while the final discretionary decision to grant or deny a waiver pursuant to section 244 of the INA is not reviewable, the underlying determination of eligibility for relief is reviewable, despite the proscriptions of the IIRIRA. *Kalaw v. INS*, 133 F.3d 1147, 1150-1152 (9th Cir. 1997).[3] Just as in section 212(i) [8 U.S.C. § 1182(i)], the final decision regarding an application for section 244 was left in the discretion of the Attorney General. *Id.* at 1151. Also, as with section 212(i) waiver, the transitional rules of the IIRIRA withdrew from the federal courts the jurisdiction to review discretionary decisions under section 244 of the INA. Despite this bar on review, the Ninth Circuit held that the underlying determination of an alien's eligibility is reviewable. *Id.*

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[3] Section 244(a)(1) [8 U.S.C. § 1254(a)(1) (now repealed)] like section 212(i), permitted the Attorney General to grant an alien relief from deportation if that alien had been physically present in the United States for a continuous period of seven years or more and met certain other criteria.

Therefore, the court of appeals violated its own precedent decisions when it denied Mr. Garcia's Petition for Review and incorrectly reasoned that the IJ did not need to adjudicate Mr. Garcia's application for a waiver. App. 3, *infra*.

2. The Court of Appeals Violated a Fundamental Rule That an Immigration Judge Has a Mandatory Duty to Inform An Alien of His or Her Apparent Eligibility For Relief From Deportation

The IJ neglected his mandatory duty to inform Mr. Garcia of his apparent eligibility to apply for a waiver and violated the regulations by denying Mr. Garcia an opportunity to make an application for a waiver during his hearing. See 8 C.F.R. § 240.11(a)(2), App. 21, *infra*.

The nonreviewability provision of the INA does not remove from judicial review actions in violation of mandatory duties of IJs and the BIA that are conducted pursuant to the usual rules of administrative procedure. *Barahona v. Reno*, 236 F.3d 1115 (9th Cir. 2001). If an IJ fails to advise an individual of an avenue of relief potentially available to him or her, the Ninth Circuit will remand for consideration of the individual's eligibility for that relief. See *Asani v. INS*, 154 F.3d 719, 729 (9th Cir. 1998); *Duran v. INS*, 756 F.2d 1338, 1341-42 (9th Cir. 1985); *Bu Roe v. INS*, 771 F.2d 1328, 1334 (9th Cir. 1985) (quoting *United States v. Barraza-Leon*, 575 F.2d 218, 222 (9th Cir. 1978)).

In *Duran v. INS*, *supra*, the Ninth Circuit stressed:

> We do not look with favor upon INS violation of its own regulations. *Mendez v. INS*, 563 F.2d 956,

> 959 (9th Cir. 1977). Had the INS notified [Mrs. Duran] as required, she may have been able to demonstrate extreme hardship. The INS must be held to the highest standards in the performance of its duties.

CONCLUSION

For the reasons stated above, Mr. Garcia respectfully requests that the Court grant his petition for certiorari.

Respectfully Submitted,

CARL SHUSTERMAN
624 S. Grand Ave., Suite 1608
Los Angeles, CA 90017
(213) 623-4592

Counsel for Petitioner

Dated: April 4, 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNESTO T. GARCIA Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 00-70374 I&NS No. A26-254-031 MEMORANDUM* (Filed Oct. 17, 2001)

Petition to Review a Decision of the Board of Immigration Appeals

Argued and Submitted October 1, 2001
Pasadena, California

Before: O'SCANNLAIN, and PAEZ, Circuit Judges, and KING,** District Judge.

Ernesto T. Garcia, a native and citizen of the Philippines, petitions for review of a decision of the Board of Immigration Appeals ("BIA") upholding an Immigration Judge's ("IJ") determination denying him adjustment of

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as may be provided by Ninth Circuit Rule 36-3.

** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

status, voluntary departure, and waiver of inadmissibility. For the reasons set forth, we deny the petition.

Jurisdiction in this case falls under the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) ("IIRIRA"), because (1) immigration proceedings were initiated before IIRIRA's effective date of April 1, 1997 and (2) the BIA's final order of deportation was issued after October 30, 1996. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).

Under IIRIRA's transitional rules, "there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act [sections 1182(c), 1182(h), 1182(i), 1254, or 1255 of this title] as in effect as of the date of the enactment of this Act [Sept. 30, 1996])." IIRIRA § 309(c)(4)(E), 8 U.S.C.A. § 1101 historical and statutory notes (1999) (brackets in original).

However, "[w]e continue to have jurisdiction to determine whether jurisdiction exists[.]" *Aragon-Ayon v. INS*, 206 F.3d 847, 849 (9th Cir. 2000). The court also has jurisdiction over due process challenges. *Antonio-Cruz v. INS*, 147 F.3d 1129, 1130 (9th Cir. 1998).

Garcia applied for adjustment of status under section 245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255 (1986), pursuant to an immediate relative visa petition. Such relief is discretionary. *See* 8 U.S.C. 1255(a). The IJ exercised his discretion when he denied adjustment on the merits, basing his decision in part on Garcia's false representations to an INS investigator on

September 2, 1987 as well as equivocations and contradictory testimony at the hearing on November 7, 1989 and in previous applications. Accordingly, we lack jurisdiction over the discretionary denial of adjustment of status. *Kalaw*, 133 F.3d at 1150.

Similarly, voluntary departure falls under section 244 of the INA, 8 U.S.C. § 1254(e) (1996). Voluntary departure is discretionary. *Antonio-Cruz*, 147 F.3d at 1130. The IJ exercised his discretion in denying the application for voluntary departure for reasons similar to the denial of adjustment of status. We therefore lack jurisdiction to consider a challenge to the BIA's decision upholding the denial of voluntary departure. *Kalaw*, 133 F.3d at 1150.

As for waiver under former INA section 212(h) or (i), the IJ's decision regarding the application was also a matter of discretion. *See Casem v. INS*, 8 F.3d 700, 702-03 (9th Cir. 1993). Again, under IIRIRA's transitional rules, we lack jurisdiction to review such discretionary decisions. *See Kalaw*, 133 F.3d at 1150; *see also Westover v. Reno*, F.3d 475, 481 (1st Cir.) ("Since the IJ denied Westover's application for adjustment of status as a matter of discretion, there was no need to adjudicate the form I-601."), *cert. denied*, 531 U.S. 813 (2000).

As to Garcia's constitutional argument, over which we do have jurisdiction, there simply was no showing of a due process violation. There was sufficient evidence for the IJ and BIA to conclude that Garcia lied on his application about his arrest and once again at the interview with the INS. Moreover, assuming the IJ had specifically found Garcia excludable because of fraud or misrepresentation, it is not improper, as a matter of law, to consider the

underlying fraud in exercising discretion to grant or deny a waiver. *See INS v. Yang*, 519 U.S. 26, 30-32 (1997) (rejecting position that the Attorney General may not consider the fraud establishing eligibility for waiver in determining the actual waiver). Finally, there is no due process prohibition against the IJ asking questions of a petitioner. *See Antonio-Cruz*, 147 F.3d at 1131.

PETITION FOR REVIEW DENIED.

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A26 254 031 – Los Angeles

Date: MAR – 9 2000

In re: ERNESTO TERROBIAS GARCIA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Jay Segal, Esquire
624 South Grand Avenue, Suite 1608
Los Angeles, California 90017

CHARGE:

Order: Sec. 241(a)(11)(B), I&N Act [8 U.S.C. § 1251(a)(11)] – Convicted of controlled substance violation

Lodged: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – Nonimmigrant – remained longer than permitted

APPLICATION: Adjustment of status; waiver of inadmissibility; voluntary departure

By decision dated November 7, 1989, an Immigration Judge found that the respondent was deportable, and he denied his applications for relief, i.e., adjustment of status, waiver of inadmissibility, and voluntary departure, finding that the respondent did not merit a favorable exercise of discretion because he had lied in an attempt to obtain immigration benefits. He also found that the respondent did not have the required good moral character for voluntary departure. The respondent's timely

appeal from that decision was summarily dismissed by the Board under 8 C.F.R § 3.1(d)(1-a)(i)(A). The case is now before us again for a decision on the merits pursuant to a remand from the United States Court of Appeals for the Ninth Circuit. The appeal will be dismissed.

The Immigration Judge correctly found that the respondent had lied during his deportation proceedings. Specifically, on his application for adjustment of status (I-485), the respondent denied ever being arrested for any violation of any law or ordinance, including a traffic violation (Exhibit 7-B, p. 2; Item 24(b)). However, as the Immigration Judge correctly pointed out, the respondent had been arrested for a controlled substance violation (Exh. 2), and he had several traffic tickets. Moreover, the Immigration Judge also determined that the respondent attempted to mislead the Immigration Court about his reasons for providing false information about his arrest record, although the respondent finally acknowledged that he had lied to avoid a negative decision on his application for adjustment of status (Tr. at 67).

Based on such a record, we reject the respondent's argument that the Immigration Judge abused his discretion in determining that he did not warrant a favorable exercise of discretion. *See generally Matter if* [sic] *Tijam*, Interim Decision 3372, at 8 (BIA 1998) (noting that "[m]aking false statements under oath . . . is an extremely serious adverse factor" to consider when determining if a favorable exercise of discretion is warranted). Moreover, because the record contains documentation establishing that the respondent had been arrested (Exh. 2), and that he claimed in proceedings that he had not (Exh. 7-B), we reject his argument on appeal that the Immigration

Judge's finding that the respondent misrepresented this fact is not supported by "reasonable, substantial, and probative evidence."

We also reject the respondent's argument that he was denied his "statutory, regulatory, and due process rights to a fair deportation hearing." The only specific example of this denial of due process provided by the respondent is his allegation that the interpreter at the hearing failed to interpret competently. However, the respondent has not directed our attention to a single specific error in the translation, nor has he explained what was misunderstood or omitted by the translator that could have affected the outcome in this matter. *See Acewicz v. INS*, 984 F.2d 1056, 1063 (9th Cir. 1993). For all of these reasons, and because we find no error in the Immigration Judge's decision, the following order shall be entered.

ORDER: The appeal is dismissed.

/s/ Edward R. [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Los Angeles, California

File No.: A 26 254 031 — November 7, 1989

In the Matter of)
ERNESTO TERROBIAS GARCIA) In DEPORTATION Proceedings
Respondent)

CHARGE: 241(a)(11) and 241(a)(2) of the Immigration and Nationality Act, controlled substance violation and non-immigrant overstay.

APPLICATION: 245 adjustment and voluntary departure in the alternative.

ON BEHALF OF RESPONDENT:
Russell Marshak, Esquire
Los Angeles, California

ON BEHALF OF SERVICE:
Robert Bryant
General Attorney, USINS
Los Angeles, California

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old married male alien, a native and citizen of the Philippines, who entered the United States on or about April 12, 1983, at Chicago, Illinois. The respondent was issued an Order to Show Cause on February 24, 1988, charging him with being deportable under Section 241(a)(11) of the Immigration and Nationality Act, having been convicted of a controlled substance violation (*See* Exhibit 1); and subsequently a lodged charge (*See* Exhibit 4) was issued on August 3, 1988, charging him with being additionally deportable under Section 241(a)(2) and 101(a)(15) of the

Immigration and Nationality Act, non-immigrant overstay.

The respondent, through counsel, denied Allegation 4 and the charge of deportability on the original Order to Show Cause, and denied Allegations 6 and 7 and the second charge of deportability on the lodged charge.

The Government introduced into evidence a number of conviction records and other documents relating to the respondent's entry into the United States. *See* Exhibits 2, 3, 5 and 6.

The Government's evidence disclosed that the respondent was convicted of a criminal offense as related to the original charge of deportability, but a further document submitted by respondent's counsel (Exhibit 3) disclosed that the respondent's plea of guilty was "set aside and judgment vacated" on or about July 26, 1988.

The Government's evidence submitted, however (*See* Exhibits 5 and 6), disclosed that the respondent was admitted to the United States on or about April 12, 1983, and authorized to remain until January 10, 1984, with a subsequent grant of extensions to remain up to January 1, 1985. I find from the evidence submitted by the Government that the respondent is not deportable as charged on the original Order to Show Cause issued by the Government due to the vacated order issued by the trial court on or about July 26, 1988. The Court finds, however, that the subsequent lodged charge has been sustained by the documents submitted by the Government, although there is a clerical error indicating the actual date of permission for extension to remain as actually January 1, 1985, and not

April 4, 1984. Regardless, however, the respondent overstayed his authorization in the United States and is deportable under Section 241(a)(2) of the Immigration and Nationality Act.

The Government, however, argues that the respondent is deportable from the United States under Section 241(a)(11) despite the vacated order and judgment of the court which diverted the respondent to a drug rehabilitation program. The Government is citing *Ocon-Perez v. INS*, 550 F.2d 10153 (9th Cir. 1977). a 9th Circuit decision that an expunged conviction retains its character for purposes of deportation in reference to two burglary convictions.

The Service confuses expungement with a vacated order, which apparently from the record indicated (Exhibit 3) was the order issued by the judge. A conviction which is vacated cancels or nullifies any conviction. *Matter of O'Sullivan*, 10 I&N Dec. 320 (BIA 1963). The respondent's conviction was vacated, not expunged. The Court, therefore, finds that there is no conviction that would make the respondent deportable pursuant to Section 241(a)(11) of the Act.

The respondent then sought relief from deportation in the form of asylum, temporary withholding of deportation, adjustment of status under Section 245 of the Act, and voluntary departure in the alternative under Section 244(e) of the Act. The respondent subsequently, at the hearing on November 7, 1989, which was scheduled for presentation of his claims for relief, withdrew and waived his applications for asylum and withholding of deportation under Sections 208 and 243(h) of the Act.

The respondent then proceeded only with his applications for adjustment of status under Section 245 and voluntary departure in the alternative. The respondent also disclosed at the end of the proceeding that he would seek a Section 212(h), Form I-601 waiver if the Court believed that respondent was also excludable or deportable under that section of law.

The respondent who applies for adjustment of status under Section 245 is required to meet the statutory requirements of law. The Court notes first that the respondent's marriage and filing of the application occurred prior to the amendments in the Immigration Marriage Fraud Act which precluded Immigration Judges from considering applications for adjustment for marriages after the date of enactment. A marriage taking place before that date of enactment thereby qualifies respondent for adjustment of status or consideration of that status change before the Immigration Judge. I, therefore, have jurisdiction.

Adjustment of status, however, requires that an alien show eligibility for his relief both statutorily and as a matter of discretion. The respondent has shown that he is married to a United States citizen who petitioned for him, and whose visa petition was approved by the District Director of the INS. There is no indication of medical disability that would cause denial.

The issue, however, in any application for relief is not only statutory eligibility, but eligibility as a matter of discretion. The respondent in his original application submitted to the Government (*See* Exhibit 7-8) dated May 8, 1987, in Item 24(b) denied ever being arrested, cited,

charged, or indicted for a violation of any law or ordinance, including traffic violations. In fact, the INS officer indicates by his red slash mark through Items 24(a), (b), (c) and subsequently, with the indication in red ink of "no arrests" that the respondent answered in the negative to all three subquestions.

The Court takes administrative notice that it is the standard procedure of an Immigration officials [sic] when interviewing an individual for an application that a red hashmark or slash through an answer or response indicates that the question had been asked and answered, and that unless there are changes so noted, that the response was as indicated originally by an individual in his application. Further notification to the Court that this was done is the fact that the officer then wrote in red ink "no arrests."

The respondent, when questioned under oath in this proceeding, equivocated in regard to why he had indicated in the negative to all three questions; first indicating that he had not yet been convicted of the crime and, therefore, had indicated negative in regard to Item 24(b). When questioned further by the Court in regard to whether he had been asked by the preparer of the document the specific question, he indicated that he had been so questioned. The Court notes that the certification is, according to the declaration, by Ruth Shamir, one of the principal partners in the law firm of Popkin, Shamir and Golan, an experienced and long-time Immigration attorney with years of background in the Immigration laws.

The respondent, when further questioned, however, indicated when asked as to why he had failed to respond

in the positive about an *arrest*, attempted to equivocate again by explaining that at the time of filling out the application, he had not yet been arrested. It was pointed out to the respondent, however, that this preparation of the document occurred on April 10, 1987, and that his arrest and indictment occurred in January of 1987, months before the preparation of this document.

The respondent finally at that point admitted that he answered in the negative to the questions because he was afraid if he answered positively or affirmatively that he had been arrested and was under present indictment, that his application for adjustment would be denied.

The Government also introduced into evidence Exhibit 15, indications that the respondent had two traffic violations or citations for albeit minor vehicle code violations. This disclosure, however, also was not admitted to by the respondent in his original application (Exhibit 7-B), nor in the application sworn to under oath by the respondent before this Court. (*See* Exhibit 7 dated and signed and sworn to by the respondent on November 7, 1989, before this Court). That document also was prepared and certified by, again, attorney Ruth Shamir on July 12, 1988. The respondent's only explanation as to this discrepancy which, as the Court notes, requires an alien to answer that information, is that he was not asked anything about traffic violations. The respondent, in his application (Exhibit 7), that is the latest application submitted to the Court, does not disclose any traffic violations and the only crime listed is the one indicating the selling of drugs in which he was under probation.

The respondent's statements and testimony in this proceeding are highly suspect in light of the testimony he has provided, and the applications he has submitted. An application for adjustment of status is a discretionary application, and the Court weighs heavily the respondent's U.S. citizen spouse and two U.S. citizen children. But an alien does not establish grounds for granting of that application merely because of equities which he has established here; and the Court should not negate or disregard the fact that the respondent has presented equivocating and contradictory testimony under oath.

The respondent appears to have continued (in his presentation before this Court) today to have presented false statements, hoping that his lies would not be discovered, fearful that if they are, that the applications would be denied.

The respondent originally in his application for asylum, when filing before the District Director of the INS, lied in his application, albeit fearful that it would be discovered and the application denied. When asked under oath in this proceeding as to what occurred, the respondent again attempted to lie and equivocate in regard to his reasons for or absence of truthful information being provided.

First, trying to convince the Court that he failed to disclose his narcotics conviction or arrest because he had not yet been convicted. Then when confronted with the fact that the information asked also included arrests, alleging that the arrest did not occur before the preparation of the application. When confronted with the fact that the application was prepared three to four months

after his arrest, he finally admitted, upon being caught in the lies, that he was fearful that the admissions would cause a denial of the application.

The respondent has shown by his own lack of credible testimony and good faith that he does not warrant the application for adjustment of status as a matter of discretion, willing to lie at any point in the proceedings before the Immigration Service, the Court or the Government of this country in order to remain in this country.

The Court wonders what else the respondent has failed to disclose in light of the testimony he has presented today.

Adjustment of status is a matter of administrative grace, not merely statutory eligibility, and is deemed extraordinary relief which the alien has the burden to convince or provide. An alien who conceals facts of relevant nature or even facts which he believes may be relevant, but turn out to be immaterial, does not establish the burden he bears. *Chan v. INS*, 631 F.2d 978 (9th Cir. 1980). As stated in *Matter of Marquez*, 16 I&N Dec. 314 (BIA 1977), a 245 adjustment application can be denied even where an alien meets the statutory requirements, as such statutory requirements are merely eligibility for 245 adjustment and is not entitlement to adjustment of status.

The Court, therefore, finds the respondent, as a matter of discretion, ineligible for the relief he is seeking due to the presentation and evidence submitted by the respondent in this proceeding.

The Court notes that the respondent's counsel also alluded to a 212(i), Form I-601 waiver, believing that if

the Court found the respondent statutorily ineligible because of an excludable ground of a narcotics offense, that this waiver should be considered. The Court notes that the application is denied due to the presentation of the respondent at this proceeding under oath, which the Court has found to be self-serving, evasive and disingenuous.

A Form I-601 waiver pursuant to 212(i) would be inapplicable to an alien who attempts to misrepresent his application before an Immigration Judge. An alien logically should not permitted to make false presentations before an Immigration Judge and then seek waiver from that same Judge in which he has presented falsehoods and misstatements. I do not find the respondent eligible for that relief, nor would I grant it if such application were submitted and filed.

ORDER

IT IS ORDERED that the respondent's application for 245 adjustment of status in the United States be denied.

The Court notes that the respondent's only other application before the Court is an application for voluntary departure. The Court does not believe the respondent eligible for that relief in light of the determinations made by the Court in regard to his principal application for adjustment of status.

An alien in seeking voluntary departure also seeks an application for discretionary relief and must establish not only statutory, but discretionary factors for that relief. The Court notes that the respondent's presentation in this

case evidences disingenuous and fraudulent statements under oath. The respondent certainly does not indicate from this testimony that he is eligible as a matter of discretion for voluntary departure. *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972). An alien is ineligible for voluntary departure statutorily as lacking good moral character if he has given false testimony to material or immaterial facts presented in a case. *Liwanag v. INS*, 872 F.2d 685, 689 (5th Cir. 1989). An Immigration Judge may consider a respondent's Immigration history in deciding whether to grant discretionary relief from deportation. Certainly the latest record of his presentation, i.e., his history in this proceeding, casts doubts upon his eligibility for relief. *INS v. Rios-Pineda*, 105 S. Ct. 2098 (2101-03 1985). The respondent's applications, therefore, for any relief will be denied.

ORDER

IT IS ORDERED that respondent's applications for Section 245 adjustment, 212(i) and voluntary departure under Section 244(e) of the Act be denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to the country of the Philippines on the charge contained on the Order to Show Cause.

/s/ Thomas Y.K. Fong
THOMAS Y.K. FONG
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNESTO T. GARCIA Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 00-70374 I & NS No. A26-254-031 ORDER (Filed Jan. 7, 2002)

Before: O'SCANNLAIN, and PAEZ, Circuit Judges, and KING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Paez voted to deny the suggestion for rehearing en banc, and Judge King so recommended.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and suggestion for rehearing en banc are therefore DENIED.

* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Section 245 of the Immigration and Nationality Act [8 U.S.C. § 1255(a)]

(a) status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 1154(a)(1) of this title or may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 212(a)(6)(C)(i) of the Immigration and Nationality Act [8 U.S.C. § 1182(a)(6)(C)(i)]

(a) Classes of aliens ineligible for visas or admission
(6) Illegal entrants and immigration violators
(C) Misrepresentation
(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure

or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212 of the Immigration and Nationality Act [8 U.S.C. § 1182]

(i) Admission of immigrant excludable for fraud or willful misrepresentation of material fact

The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) of this section –

(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be contrary to the national welfare, safety, or security of the United States.

Section 349 of the Illegal Immigrant Reform and Responsibility Act of 1996 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)

Waiver of misrepresentation ground of inadmissibility for certain alien –

Subsection (i) of section 212 (8 U.S.C. 1182) is amended to read as follows:

"(i)(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).".

Section 309(c)(4)(E) of the Illegal Immigrant Reform and Responsibility Act of 1996 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)

Effective dates; Transition –

(4) Transitional changes in judicial review. – In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act)

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8 C.F.R. § 240.11(a)(2)

(2) In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the alien is inadmissible under any provision of section 212(a) of the Act, and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing.

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8 C.F.R. § 245.1(f)

(f) Concurrent applications to overcome grounds of inadmissibility. Except as provided in 8 CFR parts 235 and 249, an application under this part shall be the sole method of requesting the exercise of discretion under sections 212(g), (h), (i), and (k) of the Act, as they relate to the inadmissibility of an alien in the United States. No fee is required for filing an application to overcome the grounds of inadmissibility of the Act if filed concurrently with an application for adjustment of status under the provisions of the Act of October 28, 1977, and of this part.